The law as a (limited) means to address colonial injustice

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Calls for reparations for historic injustices dominate current Namibian discourse. Such calls are directed to both the German and Namibian governments. The German government is called upon to take full responsibility for the heinous crimes committed against the Ovaherero and Nama peoples during the 1904–1908 genocide. After all, the impugned genocidal acts were perpetrated under the infamous orders of General Lothar von Trotha, who acted in the name of the German Kaiser. The Namibian government is called on to facilitate the restoration of ancestral lands confiscated from indigenous communities during the colonial and apartheid period.

Many, including Namibian-born Germans, fiercely oppose calls for reparations. For instance, some call them backward-looking, vengeful and opportunistic. While the German government appears ready to atone for its role in colonial injustices, such readiness comes with questionable caveats. On the other side, the Namibian government has adopted a rather patronizing and know-it-all approach to the reparations debacle. The biggest obstacle to reparations, however, appears to be the law itself.

The grave violations committed against the Ovaherero and Nama peoples predate the establishment of international human rights law. This presents a real and formidable obstacle. The intertemporal principle deserves calling out. Under this doctrine, the validity of an act and its legal entailments are to be judged with reference to the law in force at the time the act was performed, not at a later date when a legal dispute arises. Following this doctrine, the vile acts committed against the Ovaherero and Nama peoples cannot be considered a genocide, because such a crime did not exist at the time. The German government invokes this legal doctrine to evade legal liability for the 1904–1908 genocidal acts.

The Namibian government similarly invokes archaic legal principles to suppress and reject ancestral land claims. The 28 August 2019 *Tsumib v. Government of the Republic of Namibia* judgment is a case in point. In this case, eight members of the Hai||om community sought the court's permission to represent their community in taking legal action to reclaim their ancestral land rights over Etosha National Park and the Mangetti area. They submitted six claims on behalf of the Hai||om people. The court threw out the case without considering its merits. It held that the representatives did not have the necessary *locus standi* to represent the Hai||om people. Namibia's law on standing is very restrictive. For example, it does not recognize class action, whereby one or more plaintiffs litigate on behalf of themselves and other similarly situated persons. The *Tsumib* judgment is disturbingly worrisome and regrettable. The case presented an ideal opportunity to

develop archaic standing rules to espouse the Namibian constitution's value, spirit and purport. Yet, it appears that our courts are not ready to do this.

My take-home message is that efforts to redress colonial injustices in Namibia cannot be resolved by relying on the very laws that caused such injustices. Following the *Tsumib* judgment, there is a strong case to be made for exploring and investing in restorative justice processes as a way to achieve reconciliatory justice for colonial injustices in Namibia.

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